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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JEFF DUFFETT, Defendant and Appellant.	E050939 (Super.Ct.No. RIF147001) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton, James H. Flaherty III, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Jeff Duffett, of three counts of committing lewd and lascivious acts on a minor (the first victim) and three counts of committing lewd and

lascivious acts on another minor (the second victim) (Pen. Code, § 288, subd. (a)).[1] The jury further found true an allegation that defendant victimized more than one minor (§ 667.61, subd. (e)(5)). In bifurcated proceedings, defendant admitted having suffered a strike prior (§ 667, subds. (c) & (e)). He was sentenced to prison for two terms of 30 years to life and appeals claiming evidence was erroneously admitted and his motion to dismiss his strike prior was improperly denied. We reject his contentions and affirm. The facts involving these offenses, except as discussed in connection with the issues, are irrelevant to this appeal.

ISSUES AND DISCUSSION

1. *Exclusion of Evidence*

a. *Testimony of Defendant's Former Employer*

The prosecution planned to introduce, pursuant to Evidence Code section 1108,[2] defendant's conviction in federal court in Nevada for possessing child pornography in 2002 in order to show defendant's intent during the charged offenses. Before trial began, the defense sought permission to introduce the testimony of an attorney who previously had employed defendant. Defense counsel predicted that this attorney would testify that as part of his employment of defendant, he contracted defendant to view child pornography for him in connection with cases involving pedophiles. However, following

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] That section provides for the admission of evidence of defendant's commission of another sexual offense, including possession of child pornography, during a trial of a current sexual offense.

the defense's agreement, at the end of the prosecution's case in chief, to stipulate that defendant had been convicted of possessing child pornography in federal court in Nevada, defense counsel represented to the trial court that the attorney would testify only that he employed defendant to work for him on several pedophile cases, but the attorney did not instruct defendant to download child pornography as part of his duties. Without contradiction from defense counsel, the prosecutor contested this amended prediction of the attorney's testimony, saying that the attorney had made the statement that he "never employed [defendant] to look at pedophile[e] cases."[3] The prosecutor asserted that if the

[3] At the time, defense counsel did not contradict this representation by the prosecutor. However, as part of her motion for a new trial following defendant's convictions, in a declaration, she stated that she had asked some of the jurors if their verdict would have been different had the attorney's testimony "established that [defendant] had been employed by the attorney . . . to engage in a criminal defense investigation regarding a pedophile-related case or cases." She added that the prosecutor had interrupted her interview of the jurors by saying that "the attorney . . . would not have said that he employed [defendant] for pedophile cases . . . ." The declaration went on to state that before the trial court ruled the attorney's testimony was inadmissible, defense counsel read to the attorney a portion of a probation report that had been prepared in connection with defendant's federal conviction in which the probation officer assertedly stated, "'Contact with [the] attorney . . . confirmed [that] the defendant was employed at his law office [as] a research associate for several cases (specifically, pedophiles). However, [the attorney] did not instruct the defendant to download/view child pornography at any time.'" According to the declaration, the attorney told defense counsel that he did not have an independent recollection of what he told the federal probation officer at the time, but everything he said to him was truthful. The declaration stated that the attorney said that defendant "created diagrams and documents *of that nature*" without specifying to what this is referring, and attended court with him on more than one occasion. However, the declaration went on, the attorney told the defense investigator that he did not want to testify at this trial and if defense counsel forced him to, he "would 'sink [the defendant's] ass.'" According to the declaration, the attorney added that if called to testify, he would say that he did not recall either the statements he assertedly made to the federal probation officer or having a conversation with defense

[footnote continued on next page]

attorney testified contrary to this statement, because perhaps he had told defense counsel that he did employ defendant to work on pedophile cases, defense counsel would have to become a witness in this case. The trial court ruled that the attorney's anticipated testimony was not probative and did not rebut anything, therefore the attorney's testimony was inadmissible.

Defendant here takes issue with this ruling. It was entirely correct.

Defendant cites cases in which the appellate court held that a defendant has a right to rebut the implication that arises from Evidence Code section 1108 evidence with evidence that an Evidence Code section 1108 prior was dissimilar to the instant offenses, and with evidence of specific instances of good behavior under circumstances similar to those surrounding the charges the defendant was then facing. (See *People v. Wesson* (2006) 138 Cal.App.4th 959; *People v. Callahan* (1999) 74 Cal.App.34th 356 (*Callahan*).) Neither case applies here, as defendant was not trying to show how the child pornography possession was dissimilar from these crimes, nor that he conducted himself within the law in circumstances similar to those here.

It is notable that in both of these cases, the defendant was not challenging the fact that he had previously been convicted of a sexual offense. Defendant asserts that by introducing this evidence, he was not trying to challenge the fact that he was convicted of possessing child pornography, but merely explaining the circumstances of his possession.

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counsel concerning those statements and if defense counsel wanted to prove otherwise, she would have to testify herself.

However, the possession of child pornography in California, and by reason of the fact that defendant's federal conviction was admitted here and thus must have contained the same elements as the California offense,[4] does not require that the defendant have a sexual intent or a sexual interest in children. In that regard, it is something of a strict liability crime, i.e., defendant's sexual intent is either irrelevant because society wants to eliminate child pornography whatever the possessor's intent, or the possessor's sexual intent is presumed in every case, which is entirely reasonable. Whatever the case, Evidence Code section 1108 permits admission of evidence of a conviction of possessing child pornography to show defendant's propensity to commit the charged offenses. Allowing defendant to introduce evidence that his 2002 possession of child pornography was motivated by his desire to do research rather than an illegal sexual interest in children would fly in the face of Evidence Code section 1108's inclusion of crimes, including possessing child pornography, that do not require sexual intent or sexual interest in children (see §§ 311.2, subds. (b), (c) & (d), 311.3 and 311.11). If it is defendant's desire to challenge Evidence Code section 1108's inclusion of crimes that do not require sexual intent or the perpetrator's sexual interest in children, he fell short of doing that both below and here. As Evidence Code section 1108 now stands, evidence of these offenses are admissible and provide a basis upon which the jury can infer that defendant had the requisite sexual intent as to the charged offenses.

[4] Defendant concedes as much.

Defendant's reliance on *People v. Griffin* (1967) 66 Cal.2d 459, holding that a defendant may present evidence that he was tried and acquitted of a prior offense when the prosecution introduces evidence that he committed that offense is equally inapplicable, as defendant was not acquitted of the child pornography possession.

More importantly, the offer of proof fell far short of what defendant here insists that it was. *At best for the defense*, it was that the attorney employed defendant to work on pedophile cases, but he did not instruct defendant to download pornography as part of his duties. By this testimony, defendant could not have "explained away" his possession of child pornography as merely part of the duties he was assigned to perform for the attorney.

b. *Testimony of Police Detective Concerning the Contents of Defendant's Computer in 2001*

Defendant sought the trial court's permission to have a police detective testify that defendant was arrested and his computer searched in 2001 and no pornography was found on it. Defense counsel asserted that this testimony would corroborate the then anticipated testimony of the attorney that defendant worked for him on pedophile cases, although the attorney did not direct him to download child pornography as part of his duties. The trial court ruled that this evidence was irrelevant. Defendant here contests this ruling. He is incorrect.

As outlined above, the record does not establish that the attorney would even have testified that defendant worked for him on cases involving pedophiles. Therefore, the evidence at issue here would clearly not have corroborated the attorney's anticipated

testimony. Even if the attorney had so testified, this evidence, as the trial court concluded, was still irrelevant. One would have to make two enormous jumps in logic to get the result defendant wanted—the first, that the mere fact that defendant was working for an attorney on cases involving pedophiles *alone* caused defendant to possess child pornography, and, second, that the fact that he did not have pornography on his computer the year before he did have it proves that the only reason he had it later was because of his employment with the attorney. The absence of pornography on defendant's computer in 2001 did not create a reasonable inference that he had it on his computer in 2002 merely because he was doing research for the attorney and for no other reason. Contrary to defendant's contention, this case is not similar to *Callahan*, already discussed above, holding that a defendant could introduce evidence showing that in circumstances similar to the charged crimes, he did not engage in illegal behavior, which is introduced to rebut Evidence Code section 1108 evidence. The seizure of defendant's computer in 2001 had nothing in common with the circumstances of the instant offenses. Moreover, as the People correctly point out, this evidence did not show the relevant circumstances, i.e., how long defendant had had the computer that was seized in 2001and whether he had other computers or access to others on which he could have viewed/downloaded child pornography or access to child pornography in print or on film. Additionally, it is quite possible that defendant did not "catch on to" his ability to view or download child pornography on his computer until 2002. As such, the evidence was meaningless and the trial court was correct in excluding it.

c. *Exclusion of Evidence of the Medical Condition of the Second Victim's Brother*

Defendant had been introduced into the family of the first and second victims before 1994 or 1995, when he was pen pals with the second victim's mother while he was in prison. After his release from prison, he briefly dated the second victim's mother, then decided to just be friends with her, but later dated her sister, the first victim's mother. He continued to be friends with the victims' grandmother, who lived in the house with the first victim and her mother, until the first victim disclosed, in June 2008, that defendant had molested her. The first and second victims were cousins and friends and they lived next door to each other. Their aunt, who was the same age as the second victim, lived in the same house as the first victim, her mother and the grandmother. Defendant, who was in a romantic relationship with the mother of the first victim, frequented the house where she, the first victim and the aunt lived and he would pick up the aunt and the second victim, and sometimes the first victim as well, and take them to parks, the river bottom or other places. It was during these excursions that defendant committed the offenses involving the second victim.

During the aunt's direct examination, she testified that the second victim's brother, who lived next door to the first victim, was around the same age as her and the second victim. The prosecutor then asked her, "When the defendant would come and pick you and [the second victim] up, did he ever bring boys along?" She responded that he did not. The prosecutor asked, "So[,] he'd always be taking the girls out?" She responded, "Yes." On cross-examination, defense counsel asked the aunt if the second victim's brother had a seizure disorder. The prosecutor's objection was sustained. Defense

counsel then asked, "Earlier, [the prosecutor] asked you specifically as to whether or not [defendant] would take [the second victim's brother] anywhere with you guys?" The aunt responded, "Yes." Defense counsel again asked if the second victim's brother suffered from a seizure disorder, the aunt responded that he did and the trial court said it had already sustained the prosecutor's objection and the evidence was irrelevant.

Defendant here claims that the trial court erred in ruling that this evidence was irrelevant. The court was correct. The defense did not make an offer of proof that defendant was even aware that the brother had a seizure disorder. Further, there was no offer of proof that this was the reason he did not take the brother with them on outings, the latter of which could have been proven only by defendant's testimony, and he declined to testify. As such, the evidence was not susceptible to creating an inference that defendant had a legitimate reason for not including the brother in his outings with the second victim and the aunt. Defendant did not carry his burden of making an offer of proof demonstrating the relevancy of this evidence, therefore, the exclusion was proper. (See *People v. Brady* (2005) 129 Cal.App.4th 1314, 1332.)

d. *Cumulative Error*

Having found no error in any of the trial court's rulings addressed here by defendant, we necessarily conclude that there was no cumulative error in those rulings.

2. *Denial of Defendant's Romero*[5] *Motion*

In her written *Romero* motion, defense counsel below addressed, inter alia, defendant's background, character and prospects. However, at the hearing on the motion, she appeared to abandon these topics, instead, "submit[ting] on the fact that [his strike prior] is . . . reasonably old . . . . [¶] . . . [The] offenses [he has committed since] have not been particularly serious . . . , and . . . absent the federal conviction . . . there hasn't been anything of th[e] nature [of the current offenses] . . . ."

The trial court agreed with defense counsel that defendant's strike was old (1987),[6] but it was unable to conclude that he was outside the spirit of the three strikes law because he committed numerous offenses, for some of which he was sentenced to prison, during the interim. Therefore, the trial court denied the motion.

Defendant here contends that the trial court abused its discretion in denying his motion because the current offenses, though serious, did not involve force, violence or the threat of force or violence. He repeats defense counsel's argument below, which the trial court obviously accepted, that the strike prior was over twenty years old. He reasserts the argument he made below that his ensuing convictions were not serious or violent.

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[5] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

[6] Defendant states in his opening brief, "[T]he trial court . . . abused its discretion when it failed to strike one or both of [defendant's] strike priors." However, only one strike prior was alleged and admitted by defendant.

Since his 1987 conviction for first degree burglary, the 42-year-old defendant was convicted of possessing an illegal weapon and was sentenced to prison for 16 months. The probation granted for the first degree burglary was revoked and he was imprisoned from April 1989 to March 1990. In early 1991, he was convicted of possessing a firearm as an ex-felon and sentenced to prison for 16 months. His parole in the first degree burglary case and in the weapon possession case was revoked and he was imprisoned for the firearm possession and the parole revocations from February 1991 until January 1992. In April 1992, his parole for the first degree burglary case, the weapon possession case and the firearm possession case was revoked and he was returned to prison for that as well as a June 1992 conviction of second degree burglary. He remained in prison until October 1994. A year later, parole was suspended in both the firearm possession case and the second degree burglary case. In February 1996, he was returned to prison in both cases for a year and was paroled on the latter case in August 1996. He was discharged from parole in that case in August 1998. A year later, he was convicted of fraudulently impersonating a firefighter,[7] for which he was granted probation. He committed the instant offenses between 1999 and 2002. In early 2004, he was convicted of conspiracy, producing/trafficking/using a counterfeit access device, possessing access device equipment, possessing stolen mail and receiving and possessing child pornography. He was sentenced to federal prison and had been out on parole for less than a year when he was arrested in the instant case. Therefore, over the twenty year period between first

[7] Before his conviction in 1987 for the first degree burglary, he had been convicted twice of a similar offense.

going to prison in 1989 and his arrest in this case in January 2009, defendant had been out of prison less than a year before committing another offense, out three months, out less than eighteen months before going back in, out two years, during which he was on parole, a year after which he was convicted of another offense, then committed the instant offenses and two years later, the federal offenses.

It is debatable whether defendant's convictions following the first degree burglary were serious—even defendant, himself, concedes that the instant offenses were. The seriousness of his other offenses aside, it is apparent from a review of defendant's life during the period following his strike that, just as the trial court concluded, he committed numerous offenses. In our view, although the trial court did not so state, defendant's adult life comprised a new offense/prison revolving door that finally ended a few years before his arrest in this case. Therefore, the trial court did not abuse its discretion in determining that he was not outside the spirit of the three strikes law. (See *People v. Carmony* (2004) 33 Cal.4th 367, 377; *People v. Williams* (1998) 17 Cal.4th 148, 161.)

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

RICHLI
J.